BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ESTELA M. MARTINEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,030,916
	)	
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	
	)	

ORDER

Respondent requested review of the February 26, 2009 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on June 24, 2009.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that in the event claimant was not found permanently and totally disabled, claimant's functional impairment is 10 percent to the right upper extremity at the 200 week level and 14 percent impairment to the left shoulder at the 225 week level.

ISSUES

The ALJ awarded claimant permanent total disability benefits after concluding respondent failed to rebut the statutory presumption set forth in K.S.A. 44-510c(a)(2).

The respondent has appealed this decision alleging that the facts of this case coupled with the testimony of Michael Dreiling effectively rebutted the statutory presumption contained within the statute and established that claimant is capable of performing substantial and gainful employment.

Claimant maintains the ALJ's Order should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on June 7, 2006 while working for respondent. She injured both upper extremities and those injuries were ultimately evaluated and rated by Dr. Bieri.[1] Dr. Bieri imposed permanent work restrictions which included "shoulder-level and overhead use on the left should be performed no more than occasionally. Repetitive gripping and grasping on the right should be performed no more than occasionally to frequently."[2]

Following her injury claimant returned to work but was unable to perform her regular work duties within the restrictions she had been given. She was ultimately assigned to wipe the (production) belts down, a job she continued to perform until there was a company wide layoff. Claimant testified that although she worked in the belt wiping job until her layoff, it did cause her problems in her right hand but that she was told this was the only job available to her and if she could not do this job, then she would have no job.

Since her layoff in March 2008, claimant has remained unemployed and concedes she is not looking for a job as she does not "feel well" and is uncertain whether she can work given her condition.[3] There is no evidence within the file that claimant has made any effort to find work within her restrictions.

Claimant is in her mid-40's, does not speak English, has a minimal educational history, and minimal transferrable skills having worked unskilled, entry-level work her entire working life. Dr. Bieri made no comment with respect to her ability or inability to return to the labor market. Michael Dreiling, a vocational specialist retained by respondent, testified that claimant was incapable of performing "all types of entry-level, unskilled work in the open labor market," but he nonetheless believed there was still other work that is of an unskilled, entry level nature that would not exceed her permanent work restrictions.[4]

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[1] As noted above, the parties' do not dispute claimant's functional impairment. Dr. Bieri rated claimant at 10 percent to the right upper extremity at the 200 week level and a 14 percent functional impairment to the left shoulder.

[2] Bieri's IME Report (dated April 3, 2008) at 7.

[3] R.H. Trans. at 8.

[4] Dreiling Depo., Ex. 2 at 2 (Jan. 12, 2009 report).

Unfortunately, Mr. Dreiling offered no testimony on what claimant could expect to earn, the general availability of such jobs in the surrounding community where claimant resides, nor did he even identify what sort of job or jobs he might be referring to. It is this testimony, along with the fact that claimant had continued to work after her injury albeit in an accommodated position, that is the lynchpin of respondent's defense in this matter.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Here, both parties seem to concede claimant's injury raises a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2). And an absence of sufficient evidence to rebut that presumption compels a finding of permanent total disability.

The ALJ believed that respondent's evidence as to claimant's capacity to engage in substantial gainful employment was insufficient and as a result, she was permanently and totally disabled. The Board has reviewed the record and the considered the parties' arguments and a majority of the Board concludes the ALJ's Award should be reversed.

In *Wardlow*[5], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. Claimant's injuries involved his low back, pelvis, right hip, right thigh and ankle. One physician imposed restrictions that prohibited Wardlow from doing work that required substantial sitting or standing, climbing, squatting, kneeling, lifting, pushing or pulling.[6] The *Wardlow* Court looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

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[5] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[6] *Id. at* 114.

Here, claimant is *presumptively* permanently and totally disabled.[7] Respondent maintains this presumption has been rebutted by the fact that claimant returned to work following her surgeries in June 2007, performing the belt wiping job. And she continued to work in that position at her regular rate of pay until she fell victim to a company-wide economic layoff in March 2008. She was able to perform substantial and gainful employment up until her layoff. That, coupled with the fact that respondent's vocational expert testified that she was capable of substantial gainful employment supports the conclusion she is not permanently and totally disabled.

Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[8] The evidence from Mr. Dreiling is uncontroverted. He maintains she is capable of working. The fact that claimant worked after her injury supports his finding. Although there may be some barriers to her employment, both as a result of her restrictions and her minimal communication skills, the uncontroverted evidence is that she is capable of performing substantial gainful employment. Accordingly, the ALJ's Award is reversed on the issue of permanent total disability and by virtue of the parties' stipulation, claimant is entitled to an award based on her bilateral functional impairment as found by the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 26, 2009, is reversed in part and affirmed in part. Claimant is entitled to an Award against respondent as follows:

Claimant is entitled to 12.57 weeks of temporary total disability in the amount of $4,224.94 at a rate of $336.06.

The claimant is entitled to 21.00 weeks of permanent partial disability compensation, at the rate of $380.97 per week, in the amount of $8,000.37 for a 10 percent loss of use of the right arm, making a total award of $8,000.37.

The claimant is entitled to 31.50 weeks of permanent partial disability compensation, at the rate of $380.97 per week, in the amount of $12,000.56 for a 14 percent loss of use of the left shoulder, making a total award of $12,000.56.

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[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's decision and would find that respondent failed to sufficiently rebut the statutory presumption in favor of permanent total disability.

By virtue of claimant's bilateral injuries, claimant is presumptively permanently and totally disabled. While it is true she returned to work following her surgeries, her job was accommodated and by her own testimony, which is uncontroverted, she was having difficulty performing that job without further pain. Claimant was essentially told this was the only job available to her and failing her decision to continuing in that position, she would be terminated. The economic layoff intervened, but her protected status as an injured worker who was placed in an accommodated position rendered her particularly vulnerable in this economy.

The only evidence that attempts to rebut the presumption is the testimony of Mr. Dreiling that claimant is, in his opinion, capable of *some* sort of unskilled, entry level job. He was not asked and did not give any further details that would lend any sort of credence to his opinion. The record is silent as to what sort of job Mr. Dreiling might be thinking of, the wages that job might pay, the general availability of that job in the current job market, what impact, if any, her lack of education, transferrable skills and her language barrier might have on her success in obtaining this purported job. Mr. Dreiling did no job availability analysis or labor market survey. Under these facts and circumstances, these

Board Members, like the ALJ, are not persuaded that respondent's evidence rebuts the statutory presumption of permanent total disability. We would therefore affirm the ALJ's Award.

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge